

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

Bert J. Allen, III,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 01-224-P-C
	)	
Daniel Dubois, Tammy Lynard,	)	
and Linda Locke,	)	
	)	
Defendants.	)	

**PROCEDURAL ORDER**

In the course of the Court's recent preparation for trial in the above matter, it has come to the Court's attention that defense counsel have never made any motion to challenge the viability of the claims made against the Defendants, Daniel Dubois, Tammy Lynard, and Linda Locke, in their official capacities after the Court's action in dismissing Plaintiff's claims against York County Sheriff's Department and York County Jail, *see* Order Affirming the Report and Recommendation of the Magistrate Judge (Docket Item No. 114). Thus, there exist questions as to whether those claims now have any viability in this action or can proceed to a judgment against Defendants York County and York County Jail in view of the rule of *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) and this Court's prior ruling that there is no basis to hold York County or York County Jail liable on Plaintiff's claims because of the absence of any policy, custom, or practice sanctioning the actions of the individual Defendants.<sup>1</sup>

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<sup>1</sup> This Court has recently discussed issues involving official capacity claims against government officials. *See Gomes v. Univ. of Me. Sys.*, 304 F. Supp. 2d 117, 121-22 (D. Me. 2004).

The Court **FINDS** that these questions should be resolved, in the interests of fundamental fairness to the parties and of judicial economy, before the case proceeds to trial as they bear, not on the merits of the Plaintiff's claims against Defendants Dubois and Lynard individually but only upon the questions of who is liable for damages, if any, that may be awarded by the jury and of whether Defendant Locke should remain in the case for trial at all. Therefore, it is hereby **ORDERED** that counsel for the Defendants, Dubois, Lynard, and Locke, and the pro se Plaintiff, Allen, brief the aforesaid issues and state their positions as to whether the Plaintiff's claims against the individual Defendants in their official capacities should be permitted to remain in the case for trial. It is **FURTHER ORDERED** that the said briefs of the parties shall not exceed twenty (20)

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To sustain a claim against an official in an official capacity, there must be an allegation "that the entity followed a policy or custom" that was unconstitutional. *Burrell v. Hampshire County*, 307 F.3d 1, 7 (1st Cir. 2002) ("A damages suit against an official in an official capacity is tantamount to a suit against the entity of which the official is an agent . . . and there is no claim here that the entity followed a policy or custom or deliberate indifference"); see *Hafer v. Melo*, 502 U.S. 21, 25, 116 L. Ed. 2d 301, 112 S. Ct. 358 (1991); *Kentucky v. Graham*, 473 U.S. 159, 165-66, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985). An official-capacity claim under § 1983 requires a showing that the government itself was a "moving force" behind the deprivation. *Graham*, 473 U.S. at 166; *Polk County v. Dodson*, 454 U.S. 312, 326, 70 L. Ed. 2d 509, 102 S. Ct. 445 (1981); *Monell v. Department of Social Servs.*, 436 U.S. 658, 694, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). To this end, an essential element of an official-capacity lawsuit is that the entity's policy or custom must have played a part in the violation of federal law. *Hafer*, 502 U.S. at 25; *Graham*, 473 U.S. at 166; *Monell*, 436 U.S. at 690; *Burrell*, 307 F.3d at 7.

*Id.* As explained by another court in this circuit, long-standing legal doctrine teaches that municipalities are not vicariously liable for the torts of its employees:

A town may be liable under § 1983 for its own acts, but it is not liable, based on a vicarious liability theory, for the acts of its employees. See *Bd. of the County Comm'rs v. Brown*, 520 U.S. 397 403, 137 L. Ed. 2d 626, 117 S. Ct. 1382 (1997). A town is liable only "when execution of a government's policy or custom . . . inflicts the injury." *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). A single incident, not involving a municipal policymaker, is generally not sufficient to show a municipal custom or policy. See *Mahan v. Plymouth County House of Corrections*, 64 F.3d 14, 16-17 (1st Cir. 1995).

*Wilson v. Brock*, No. 01-284-JD, 2002 WL 1676287, at \*7 (D.N.H. July 18, 2002).

pages in length; that they be filed on or before April 4, 2005; and that the parties may file reply briefs on or before April 11, 2005, and are not to exceed five (5) pages in length.

The Court **RESERVES** decision as to whether to permit the case to remain on the Court's May jury trial list. The Final Pretrial Conference now scheduled before the Magistrate Judge on March 31, 2005, shall proceed as scheduled.

/s/Gene Carter \_\_\_\_\_  
Gene Carter  
Senior District Court Judge

Dated at Portland, Maine this 21st day of March, 2005.

**Plaintiff**

**BERT J ALLEN, III**

represented by **BERT J ALLEN, III**  
56 SMITH GARRISON ROAD  
NEW MARKET, NH 03857  
(603)659-5293  
PRO SE

V.

**Defendant**

**YORK COUNTY JAIL**  
*TERMINATED: 03/11/2003*

represented by **MICHAEL J. SCHMIDT**  
WHEELER & AREY, P.A.  
27 TEMPLE STREET  
P. O. BOX 376  
WATERVILLE, ME 04901  
873-7771  
Email:  
mschmidt@wheelerlegal.com  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

**Defendant**

**SCOTT**

*YORK COUNTY JAIL INMATE*

*TERMINATED: 12/27/2001*

**Defendant**

**RICHARD**

*YORK COUNTY JAIL INMATE*

*TERMINATED: 12/27/2001*

**Defendant**

**DANIEL DOUBOUS**

*individually and in their official  
capabilities as officers of the York  
County Jail*

represented by **MICHAEL J. SCHMIDT**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Defendant**

**TAMMY LEONARD**

*individually and in their official  
capabilities as officers of the York  
County Jail.*

represented by **MICHAEL J. SCHMIDT**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Defendant**

**SCOTT BARRIEAU**

*TERMINATED: 06/11/2002*

**Defendant**

**RICHARD LOWELL**

*TERMINATED: 06/11/2002*

**Defendant**

**LINDA MOOERS**

represented by **JAMES F. MOLLEUR**  
P.O. BOX 619  
SACO, ME 04072  
(207) 283-3777  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**MICHAEL J. SCHMIDT**

(See above for address)

*LEAD ATTORNEY*

*ATTORNEY TO BE NOTICED*